In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-787

DAVID PATRICK WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Gun Control Act of 1968, 18 U.S.C. 922 (a)(16), is unconstitutionally vague, it improperly regulates intrastate transactions, and it abridges the Fifth Amendment privilege against self-incrimination. Petitioner also argues that employees of a licensed gun dealer are not licensed dealers under the Act.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of eleven counts charging the making of false statements in connection with the acquisition of firearms, in violation of 18 U.S.C. 922(a)(6), and was sentenced to a term of five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that between September 11, 1971, and November 17, 1972, petitioner purchased eleven

weapons from "Grant's Boys", a sporting goods shop in Anaheim, California. For each purchase petitioner was required, pursuant to the Gun Control Act of 1968, 18 U.S.C. 922(a)(6), to answer questions contained in Treasury Form 4473. Question 8(b) of this form inquires whether the prospective purchaser has ever been convicted of a crime punishable by imprisonment in excess of one year.[1] Petitioner answered this question negatively on each of the eleven forms. In addition, when petitioner was asked by the seller, pursuant to California law, whether he had ever been convicted of a felony, he responded negatively (Tr. 14-26; 34-39).

It is undisputed, however, that petitioner was indicted in New York State in 1967 for ciminally possessing a loaded firearm, a felony. He subsequently pleaded guilty to a lesser included offense of attempting unlawfully to possess a loaded firearm (also a felony), the maximum penalty for which is a term of three and one-half years' imprisonment.

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[1]Question 8(b) in its entirety reads as follows:

> Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year).

Following all the questions on the form there appears the following cautionary notation:

> I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

In order to prove that he had not knowingly made a false answer on the Treasury Form 4473, petitioner introduced as a witness the attorney who had represented him in the New York proceedings. The attorney testified that while petitioner had originally been charged in New York with possessing a loaded firearm, he had agreed to plead to the felony of attempting to possess a loaded firearm in return for the judge's agreement not to impose a sentence of more than one year's imprisonment, although the maximum sentence permitted by law was three and one-half years (Tr. 52). On cross-examination, the attorney admitted that he had indicated to petitioner that he was pleading to a felony, although he would be sentenced to no more than one year's imprisonment as if the offense were a misdemeanor (Tr. 68-69).

The prosecution presented evidence in rebuttal that on July 1, 1971, petitioner had attempted to secure from California authorities a permit to carry a concealed weapon In order to obtain the permit petitioner had been required to fill out a local police form inquiring whether he had ever been convicted of a felony, to which he had made the false response of "no" (Tr. 79).

1. Petitioner raises a variety of constitutional challenges to 18 U.S.C. 922(a)(6). He contends, first, that Section 922(a)(6) and the question on Form 4473 are unconstitutionally vague for failing to define what constitutes a false or fictitious oral or written statement. This contention was, however, answered by this Court in *Huddleston* v. *United States,* 415 U.S. 814, 831, where the Court found "no grievous ambiguity or uncertainty in the language and structure of the Act. * * * The question itself was forthright and direct * * *."

Huddleston also disposes of petitioner's argument that Section 922(a)(6) improperly regulates intrastate trans-

actions. As this Court stated, "Congress intended, and properly so, that § 922(a)(6) * * * reach transactions that are wholly intrastate, * * * 'on the theory that such transactions affect interstate commerce' " (415 U.S. at 833; citation omitted).

Finally, contrary to petitioner's assertion, we fail to understand how the statute affronts the privilege against self-incrimination, since mere acknowledgment of a previous conviction of record can hardly subject one to further criminal penalties for that conviction.

2. Petitioner also argues that he could not as a matter of law be guilty under Section 922(a)(6) of making false statements to a licensed dealer because he only purchased the weapons involved from the *employees* of licensed dealers. It was stipulated at trial, however, that the corporation for which the employees worked was a federally licensed gun dealer at all times relevant to the case.[2] Since a corporate employee is simply the agent of the corporation, petitioner in effect made false statements to a licensed dealer.[3]

3. Finally, petitioner contends that he responded correctly to question 8(b), since the New York judge who sentenced him indicated pursuant to the plea bargain that he would impose a sentence of no greater than one year. As the cautionary note following question 8(b) specifies, however, "[t]he actual sentence given by the judge does not

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[2]In addition to this stipulation, the trial court instructed the jury that the dealer involved must be licensed (Tr. 161). Thus, no conflict exists between this case and *United States* v. *Jordan*, 454 F.2d 323 (C.A. 7), where no evidence was introduced to prove that the dealer indeed was duly licensed.

[3]Contrary to petitioner's contention that the indictment failed to state an offense, the indictment explicitly states that petitioner knowingly and willingly made false statements (Pet. App. C).

matter—a yes answer is necessary if the judge could have given a sentence of more than one year." The maximum sentence permitted under New York law was three and one-half years.

In any event, it was for the jury to determine whether petitioner had made the false statement willfully or as a result of a good faith misunderstanding. Indeed, there was ample evidence that petitioner's response was a calculated falsehood. Petitioner told the store salesmen and the local police department that he had never been convicted of a felony, when in fact his New York attorney had made clear to him in 1968 that he was being sentenced for a felony (Tr. 68).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[4]Such "similar acts," were admissible at trial to show knowledge. See Rule 404 of the recently enacted Federal Rules of Evidence.